No. 83-1944 (4)

In the Supreme Court of the United States

OCTOBER TERM, 1984

HOLLY JENSEN, ETC., ET AL., PETITIONERS

v.

FRANCES J. QUARING

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The United States will address the following question:

Whether the court of appeals applied the correct legal analysis under the Free Exercise Clause in determining that respondent's sincerely held religious objection to being photographed outweighs the State of Nebraska's interest in using photographic driver's licenses as a quick and accurate means by which to identify motorists.

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INTEREST OF THE UNITED STATES

The court of appeals has held unconstitutional, as applied to respondent, Nebraska's statutory requirement for a photographic driver's license. The court concluded that respondent holds a sincere religious objection to being photographed and that the State's "important" interest in quick and accurate identification of motorists is not "so compelling as to prohibit selective exemptions to the photograph requirement" (Pet. App. 19, 27).

The United States does not issue general driver's licenses, and thus we have no programmatic interest

in the resolution of this particular case. The United States does, however, have a substantial interest in the legal approach used to analyze claims that facially neutral statutory requirements violate the Free Exercise Clause. See, *e.g.*, *United States* v. *Lee*, 455 U.S. 252 (1982). Indeed, on November 13, 1984, the United States docketed an appeal to this Court in *Heckler* v. *Roy*, No. 84-780. The question presented in that case is whether 7 U.S.C. 2025(e) and 42 U.S.C. 602(a)(25), which require all applicants for and recipients of benefits under the Food Stamp and Aid to Families with Dependent Children programs to provide state welfare agencies with their social security numbers, violate the Free Exercise Clause as applied to persons who hold a sincere religious objection to the use of such numbers.

As explained in our jurisdictional statement in *Roy* (at 13-18), we believe that the district court in that case, like the court of appeals here, erred in focusing primary attention on the number of persons who potentially might seek a religious exemption from the statutory requirements at issue.[1] In our submission, proper analysis requires a broader examination into the programmatic goals sought to be achieved by the legislature than is possible when a court considers only the Free Exercise claim to an exemption advanced by one individual. Because the Court's mode of analysis in this case could affect the interests of the United States at issue in *Roy*, we briefly set forth our view of the proper legal analysis to be employed in cases of this sort.

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[1] We are providing counsel for the parties in this case with copies of our jurisdictional statement in *Roy*.

SUMMARY OF ARGUMENT

Although we take no position on the correct disposition of this case, we submit that the court of appeals' ruling that the State of Nebraska's requirement for a photographic driver's license is unconstitutional as applied to respondent rests on a flawed premise—that the smaller the number of persons objecting to a neutral requirement on religious grounds, the greater their claim to an exemption from the requirement. The logical corollary to that premise is that government may refuse to accommodate religious beliefs so widely held that the administrative burden and programmatic impact of judicially-mandated exemptions would be too great. Such a result defies common sense.

In our submission, the "least restrictive alternative" inquiry in Free Exercise cases (which becomes relevant only after it is first determined that the plaintiff has a sincerely held religious objection to the requirement at issue and that the requirement serves a compelling governmental interest) should focus on the programmatic interests furthered by the statutory requirement—in this case, highway safety. If the State can accomplish its objective equally well by adopting a less restrictive alternative applicable to the populace as a whole, then it may be appropriate to require the State to adopt that alternative in the case of a particular plaintiff. But if photographic driver's licenses are required to accomplish the State's general goal of promoting highway safety, then the State should not be required to devise alternatives (or, as the court of appeals held in this case, forgo its interests altogether) simply because the granting of a handful of exemptions might work only a marginal interference with the legislative purposes.

The correctness of this approach is demonstrated by the decision in *United States* v. *Lee*, 455 U.S. 252 (1982), in which this Court rejected the claim of an Amish employer for an exemption from paying social security taxes for his employees. The Court did so despite the fact that an exemption limited to Amish employers would have done little if any damage to the integrity of the social security system, because the Amish not only oppose paying into the system but also oppose receiving benefits. Instead, the Court focused on the compelling governmental interest in uniform administration of the social security program and concluded that mandatory participation by all employers was essential to the achievement of Congress's purposes. So too, the earlier cases of *Braunfeld* v. *Brown*, 366 U.S. 599 (1961), and *Prince* v. *Massachusetts*, 321 U.S. 158 (1944), demonstrate the impropriety of ignoring a legislative determination that individualized exemptions would undermine the purposes behind a neutral law of general applicability. In both cases, the Court declined to grant individualized exemptions from the statutes at issue, even though there was no indication that a few such exemptions would have worked any serious interference with the overall legislative purposes.

This case is distinguishable from *Thomas* v. *Review Board*, 450 U.S. 707 (1981), and *Sherbert* v. *Verner*, 374 U.S. 398 (1963), in which the Court held that states could not refuse to provide unemployment benefits to persons who had terminated their employment on religious grounds. The statutes at issue in those cases expressly required case-by-case substantive determinations of each individual's entitlement to unemployment compensation, whereas the Nebraska statute at issue here imposes a purely procedural requirement applicable to all who seek general driver's li-

censes. Moreover, requiring states to pay unemployment benefits to workers who had terminated their employment on religious grounds did not interfere with the legislative purpose of ensuring that benefits were paid only to persons who had left their jobs for legitimate reasons. In this case, by contrast, the court below failed to inquire whether Nebraska's overall goal of promoting highway safety could be met if the State must accord certain people the privilege of driving on its roads while at the same time allowing those people to opt out of what may be the most effective program for policing motorists.

ARGUMENT

THE VALIDITY OF AN INDIVIDUAL'S CLAIM TO A RELIGIOUS EXEMPTION FROM A FACIALLY NEUTRAL PROCEDURAL REQUIREMENT DEPENDS UPON AN ASSESSMENT OF THE PROGRAMMATIC INTERESTS SOUGHT TO BE ACHIEVED BY THE LEGISLATURE AND NOT UPON THE COST TO THE STATE OF GRANTING AN EXEMPTION TO ONE OR A HANDFUL OF INDIVIDUALS

The court of appeals has held that the Free Exercise Clause prohibits the State of Nebraska from insisting that respondent comply with its statutory requirement for a photographic driver's license (Neb. Rev. Stat. § 60-406.04 (1978)). The court recognized that the photograph requirement serves "important" governmental interests but concluded that those interests are not "compelling" (Pet. App. 19, 27).[3] Although we take no position on the correct

[3] At the outset, we confess to some uncertainty with respect to the court of appeals' ruling that the photograph requirement does not serve a compelling state interest. The district court found to the contrary (Pet. App. 12), and the court of

disposition of this case, we submit that the court of appeals' ruling was based on a flawed premise—that the smaller the number of persons objecting to a neutral requirement on religious grounds, the greater their claim to an exemption from the requirement. No decision of this Court supports such a peculiar result. On the contrary, several of this Court's decisions indicate that, when no less restrictive means applicable to the populace as a whole are available to achieve a compelling governmental interest, the individual's interest in religious liberty must yield to the greater interest of society in the public safety and welfare.

A. This Court has repeatedly emphasized that although "the Free Exercise Clause provides substantial protection for lawful conduct grounded in religious belief, * * * '[n]ot all burdens on religion are unconstitutional. . . . The state may justify a limi-

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appeals nowhere repudiated that finding. It appears, however, that the court of appeals employed a different frame of reference for analyzing the state's interest than did the district court. Thus, instead of determining whether the photograph requirement itself serves a compelling state interest, the court of appeals inquired whether Nebraska's refusal to grant respondent an exemption served a compelling state interest (*id.* at 26). As explained in text, we believe that the court of appeals' focus on the effect of granting an exemption, rather than the programmatic interests furthered by the photograph requirement itself, reflects an erroneous approach to the issue before this Court. Before addressing that issue, however, we note that if the court of appeals meant to hold that the State's general interest in the photograph requirement is not compelling, then its analysis should have come to an end. The existence of "less restrictive means" for accomplishing the State's objectives becomes relevant only if it is first determined that the requirement at issue serves a compelling state interest. See page 7, *infra*.

tation on religious liberty by showing that it is essential to accomplish an overriding governmental interest.'" *Bob Jones University* v. *United States*, No. 81-3 (May 24, 1983), slip op. 28 (quoting *United States* v. *Lee*, 455 U.S. 252, 257-58 (1982)).

In both *Bob Jones University* and *Lee*, the Court addressed the question presented here, namely, how to resolve the conflict between a requirement that serves a compelling governmental interest and the contrary dictates of a sincerely held religious belief. When such a conflict occurs, "[t]he remaining inquiry is whether accommodating the * * * belief will unduly interfere with fulfillment of the governmental interest." *Lee*, 455 U.S. at 259. If the belief "cannot be accommodated with that compelling governmental interest, * * * and no 'less restrictive means[']* * * are available to achieve the governmental interest," the government's interest must prevail. *Bob Jones University*, slip op. 29 (citations and footnote omitted). As the Court concluded in *Lee*, 455 U.S. at 259 (footnote omitted):

> To maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good. Religious beliefs can be accommodated, see, *e.g.*, *Thomas* [v. *Review Board*, 450 U.S. 707 (1981)]; *Sherbert* [v. *Verner*, 374 U.S. 398 (1963)], but there is a point at which accommodation would "radically restrict the operating latitude of the legislature." *Braunfeld* [v. *Brown*, 366 U.S. 599, 606 (1961)].

How to determine when that point has been exceeded is a question of concern to the United States because it is the same issue presented in *Heckler* v. *Roy*, No. 84-780. See pages 1-2, *supra*.

B. The court of appeals concluded that respondent's beliefs are religious in nature and that they are sincerely held (Pet. App. 19-23). By the same token, however, the court of appeals did not question the fact that the State has important interests (see note 2, *supra*) in the photograph requirement as a general matter. The critical inquiry in this case is whether the "least restrictive means" analysis is to be applied to the programmatic state interests of identifying motorists, ensuring the security of financial transactions, and avoiding administrative burdens (see Pet. App. 26-29), or whether the Free Exercise Clause requires a case-by-case determination of each individual claim to an exemption. In our view, the court of appeals erred in considering respondent's claim in isolation and in placing its primary focus on the number of persons who potentially might seek an exemption from the photograph requirement.[3] Instead, it should have focused on the programmatic considerations addressed by the Nebraska legislature in enacting the photograph requirement and the legislature's judgment that there should be no exceptions to that requirement in the case of general driver's licenses.[4]

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[3] Although we do not believe that the number of persons seeking an exemption is relevant to the correct disposition of this case, we note that respondent's objections are not unique. See *Dennis* v. *Charnes*, 571 F. Supp. 462 (D. Colo. 1983); *Johnson* v. *Motor Vehicle Division*, 197 Colo. 455, 593 P.2d 1363, cert. denied, 444 U.S. 885 (1979); *Bureau of Motor Vehicles* v. *Pentecostal House of Prayer, Inc.*, 269 Ind. 361, 380 N.E.2d 1225 (1978).

[4] As the court of appeals noted (Pet. App. 27), certain classes of licenses are exempt from the photograph requirement. However, the legislature's decision to permit such categorical exemptions does not necessarily undermine its

This Court's decision in *Lee* demonstrates the error of the court of appeals' analysis. There, the Court rejected the claim of an Amish employer for an exemption from paying social security taxes for his Amish employees. The Court did not confine its analysis to the effect on the social security program of exempting only the Amish; if it had, the programmatic effect would have been beneficial, because the Amish not only oppose paying into the social security system but also oppose receiving benefits, and benefit pay-outs far exceed contributions. See *Lee*, 455 U.S. at 262 (Stevens, J., concurring). Rather, the Court looked to the government's compelling interest in uniform administration of the social security program and tax collection in general and concluded that mandatory participation by all employers was essential to the fiscal vitality of the program. *Id.* at 258-260.

Like *Lee*, the earlier cases of *Braunfeld* v. *Brown*, 366 U.S. 599 (1961), and *Prince* v. *Massachusetts*, 321 U.S. 158 (1944), also demonstrate the impropriety of ignoring a legislative determination that individualized exemptions would undermine the purposes behind a neutral law of general applicability. In *Braunfeld*, the appellants were Orthodox Jewish merchants whose religious convictions required that their places of business remain closed on Saturdays. They sought an injunction to prevent enforcement against them of a state Sunday-closing law, on the ground that closing their businesses on Sundays interfered with their ability to earn a living. The Court rejected the claim, noting that "to permit the exemp-

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determination that the State's compelling interest would be frustrated by recognizing exemptions from the photograph requirement in the case of general driver's licenses. See pages 14-15 & note 8, *infra*.

tion might well undermine the State's goal of providing a day that, as best possible, eliminates the atmosphere of commercial noise and activity" (366 U.S. at 608).

Prince likewise involved a state statute that imposed an absolute ban on the activity in which the appellants there sought to engage. The statute at issue was a child labor law forbidding children from engaging in street sales of magazines, newspapers, and other merchandise. Unlike the Jewish merchants in *Braunfeld*, whose religious faith was only indirectly burdened by the statute in question (see 366 U.S. at 605-607), the appellants in *Prince* were Jehovah's Witnesses whose religious faith specifically *required* that they engage in the activity the state sought to prohibit—street sales of their religious tracts. Nevertheless, the Court held that the statute was constitutional as applied to the appellants, even though there was no danger to the particular child in question, who had been closely supervised by her aunt.

These cases clearly indicate that when the legislature seeks to advance a compelling governmental interest through uniform application of a facially neutral requirement, it is not relevant that granting exemptions in rare cases might work only a minute or incremental interference with the governmental interest.[5] Here, for example, it is quite beside the point whether dispensing with the photograph requirement

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[5] The Court recently made the same point in considering content-neutral regulation of speech. See *Regan* v. *Time, Inc.*, No. 82-729 (July 3, 1984), slip op. 16 n.12 ("[I]n determining whether a time, place, and manner regulation substantially serves the State's interest, the effectiveness of the regulation should not be measured solely by the adverse consequences of exempting a particular plaintiff from the regulation.").

might lead any one individual to evade the Nebraska law that permits only licensed motorists to drive on the State's roads. The pertinent inquiry is whether the integrity of the program as a whole can be sustained equally as well without the photograph requirement—that is, whether the requirement found to offend a sincerely held religious belief is essential to accomplishment of the compelling governmental interest, or whether the State could accomplish the same goal by application of a less restrictive alternative to the entire populace (and not merely to the individual plaintiff).[6] The court of appeals erred in failing to undertake such an inquiry.

The correctness of this submission may be demonstrated by the absurd consequences that flow from the court of appeals' analysis. Essentially, the court has held that government must accommodate those individuals holding the most unique and idiosyncratic religious beliefs because the cost of exempting those

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[6] The district court noted in this regard that "[e]xperience prior to the photographic license indicated that the risk of counterfeiting and trading of licenses was at a level that the integrity of identification of drivers was in some doubt" (Pet. App. 12).

There is also something wrong with the notion, implicitly endorsed by the court of appeals, that an individual can insist on receiving the benefits of the governmental privilege of a driver's license while at the same time refusing to comply with that portion of the program that would appear to be the most effective means for ensuring that only licensed and competent motorists drive on the State's highways. The court of appeals failed to identify any less restrictive alternatives that would satisfy the State's interest in highway safety, apparently believing it sufficient that a few drivers without photographs would not be likely to cause substantial safety hazards. This approach is a distortion of the "least restrictive alternative" inquiry that finds no support in this Court's decisions.

few individuals from a facially neutral procedural requirement would be quite small. The logical corollary to this holding is that government may refuse to accommodate religious beliefs so widely held that the administrative burden and programmatic impact would be deemed too great. In essence, the right to the free exercise of religious beliefs would shrink as the number of persons who share those beliefs grows. Such a result defies common sense.

In addition, there would appear to be no limit to the "accommodations" that could be required of government under the court of appeals' approach. Respondent objects to being photographed but apparently does not object to providing any of the other identifying information required by the State. But another plaintiff might object to the use of numbers (cf. *Heckler* v. *Roy*, *supra*) and insist that the State issue him an unnumbered driver's license even though such a license would seriously interfere with the computerization necessary to manage a large-scale government program. Viewing each case in isolation, as the court of appeals' decision requires, the State would be obliged to accommodate these sorts of demands, because it unquestionably could do so in a handful of instances without undue burden or expense and with only the most minimal damage to its interest in highway safety. Logic compels the conclusion, however, that there are limits to the accommodations government is required to make in administering facially neutral program requirements, and those limits are all too likely to be exceeded when the judiciary engages in the sort of case-by-case analysis employed by the court below.

C. The present case can be distinguished from other cases in which this Court has required states to

permit religious exemptions from otherwise applicable statutory requirements. See *Thomas* v. *Review Board*, 450 U.S. 707 (1981); *Sherbert* v. *Verner*, 374 U.S. 398 (1963). Both *Thomas* and *Sherbert* involved applicants for unemployment compensation who, as a result of having been denied benefits, were forced to choose between receiving no income or continuing to engage in employment-related activity that violated their religious beliefs. In both cases, this Court held that the states were required to accommodate the religious beliefs of the individuals involved.

In contrast to the present case, however, the statutes under consideration in *Thomas* and *Sherbert* explicitly permitted exemptions from their general requirements based on *individualized* determinations of "good cause."[7] In both *Thomas* and *Sherbert*, state agencies had to make case-by-case substantive determinations concerning an individual's entitlement to unemployment compensation. Because the statutes at issue clearly contemplated the granting of individualized exemptions, requiring the states to consider religious claims did not significantly interfere with the states' ability to achieve their compelling interest in ensuring that unemployment benefits were paid only to those persons who had terminated their employment for legitimate reasons. Thus, the statutes in *Thomas* and *Sherbert* provided by their own terms

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[7] Thus, the provisions of the South Carolina Unemployment Compensation Act at issue in *Sherbert* provided that employees were ineligible for benefits only if they " '[have] failed, *without good cause*' " to apply for, accept, or return to work. 374 U.S. at 400 n.3 (emphasis added; citation omitted). Similarly, in *Thomas*, the statute provided that an individual was ineligible for benefits if he "voluntarily left his employment *without good cause*." 450 U.S. at 710 n.1 (emphasis added).

the necessary "play in the joints," *Walz* v. *Tax Comm'n*, 397 U.S. 664, 669 (1970), to allow for exemptions grounded in the Free Exercise Clause.

Here, however, the Nebraska statute at issue imposes a purely procedural requirement applicable to all who seek general driver's licenses. Those who issue the licenses do not make individualized determinations concerning the granting of exemptions; instead, that decision has been made by the legislature in defining *categories* of special licenses for which a photograph is not required.[8] That the legislature might have written the statute differently, to permit individually-determined exemptions, is irrelevant. See *Lee*, 455 U.S. at 260-261; *Braunfeld*, 366 U.S. at 608.[9] The court of appeals should have accorded

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[8] The court of appeals thought it extremely significant that the legislature has enacted categorical exemptions from the photograph requirement and concluded from that fact that individualized exemptions would not interfere with the statutory scheme (Pet. App. 27). The court's conclusion does not necessarily follow from the mere existence of categorical exemptions. The court should have considered the types of exemptions that the legislature has chosen to permit and determined whether those categories are sufficiently different from general licenses that additional, individualized exemptions would be inconsistent with the legislature's general purposes.

[9] In *Lee*, the Court noted that Congress had permitted an exception from the social security tax for self-employed Amish. 26 U.S.C. 1402(g). The Court declined to extend a similar exemption to Amish employers on constitutional grounds, reasoning that "Congress has accommodated, to the extent compatible with a comprehensive national program, the practices of those who believe it a violation of their faith to participate in the social security system." 455 U.S. at 260.

Similarly, the Orthodox Jewish merchants in *Braunfeld* objected to the fact that the Sunday-closing law there at issue

greater deference to the lines drawn by the Nebraska legislature. See *Lee*, 455 U.S. at 260.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reviewed in light of the State's programmatic interests in imposing a photograph requirement on all those who seek general driver's licenses, without regard to the burden or expense that might be incurred by the granting of an exemption in this particular case.

Respectfully submitted.

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did not permit exemptions for religious reasons. The Court noted that "[a] number of States provide such an exemption, and this may well be the wiser solution to the problem. But our concern is not with the wisdom of legislation but with its constitutional limitation." 366 U.S. at 608 (footnote omitted).

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